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No. 88-669

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

HOFLEY MANUFACTURING COMPANY,
Appellant,
VS.
ROBERT WILLIAMS,
Appellee,

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

Where the hearing referee's decision that Appellee was entitled to worker's compensation benefits was upheld by a unanimous two-member appeal board panel, comprised of one "public" representative and one "employee" representative, randomly assigned from an appeal board pool consisting of five "public" representatives, five "employer" representatives, and five "employee" representatives, was Appellant denied its Fourteenth Amendment due process right to a fair decisionmaker by the Michigan statutory scheme for assignments of worker's compensation appeal board panels?

Does this Court have jurisdiction to hear or decide Appellant's equal protection argument where it was not raised before, considered by, dispositive of, or even necessary to the final decision of the Michigan Supreme Court?

Assuming *arguendo* that this Court has jurisdiction to hear or decide the equal protection argument presented by Appellant, does Michigan's use of two-member panels (with a third member assigned in case of a split decision), a process intended to relieve documented docket congestion in the worker's compensation appeal board, deny Appellant equal protection as guaranteed by the Fourteenth Amendment?*

* All the parties appearing in the litigation before the Michigan Supreme Court are identified and set forth in the caption of this Motion.

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vs.
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Appellee,

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellee, Robert Williams, moves the Court to dismiss the appeal filed by Hofley Manufacturing Company or, in the alternative, to affirm the judgment of the Supreme Court of Michigan [*Williams v Hofley Manufacturing Co*, 430 Mich 603; 424 NW2d 278 (1988)] on the grounds that the questions presented are so unsubstantial as not to need further argument and also that appeal of the second question presented has not been taken in conformity with the jurisdictional requirements of 28 USC 1257.

STATEMENT OF THE CASE

Appellee accepts Appellant's Statement of the Case, with the following additional background and facts presented for the Court's full understanding of the worker's compensation atmosphere existing in Michigan at the time the Worker's Compensation Appeal Board considered Appellee's appeal.[1]

The Worker's Disability Compensation Act, MCL 418.101–418.941, MSA 17.237(101)–17.237(941), has had a long and controversial history in Michigan. Since its enactment in 1969,[2] it has undergone almost yearly amendments in an attempt to reconcile the desire to compensate the injured employee with the desire to stimulate the business climate in the State of Michigan.

Those amendatory reforms could not stem the burgeoning caseload of the workers' compensation system, however, and by the early 1980's the situation had reached intolerable extremes, with five-year backlogs at the appellate level a matter of course.[3]

In furtherance of reform, therefore, Governor James Blanchard in 1983 appointed Professor Theodore J. St. Antoine of the University of Michigan Law School to be his special counselor on worker's compensation by analyzing the problems and recommending solutions. Professor St. Antoine's Report was submitted to Governor Blanchard on December 12, 1984.[4]

In his report, Professor St. Antoine described the onerous situation regarding the workers' compensation appellate docket:

> "...the accelerating rate and number of appeals in recent years have caused the Board's backlog to mush-

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[1] An excellent historical summary is presented in the Michigan Supreme Court's opinion at issue here (See Appendix to Appellant's Jurisdictional Statement, pp A7–A10).

[2] Michigan originally enacted a workmen's compensation act in 1912; the entire act was reorganized in 1969 and is popularly known as the Worker's Disability Compensation Act of 1969. All references in this Motion are to the 1969 Act.

[3] Royal, *Workers' Compensation Appeals: Due Process Denied?*, 66 Mich B J 982, 985 (October 1987).

[4] *St. Antoine, Workers' Compensation in Michigan: Costs, Benefits and Fairness* (1984).

> room from a mere 2,000 cases in 1976 to almost 7,000 as of November 1984. That is the equivalent of about five or six years' output by the Appeal Board."

By 1987, compensation appeals had continued to increase so that the Appeal Board's backlog exceeded 9,000 cases.[5] In response to Professor St. Antoine's recommendations, the Legislature in mid-1985 completely overhauled the workers' compensation system (1985 Mich. Pub. Acts 103).

The worker's compensation appeal board is comprised of 15 members, three of which are designated as "employee" representatives, three as "employer" representatives, and three as "general public" representatives. MCL 418.251, MSA 17.237(251). Prior to the 1985 amendments, appeals were heard by three member panels consisting of one representative from each designation, balancing the panels by guaranteeing an equal vote for all three interests. As Appellee has previously discussed, this panel composition was unable to keep pace with the rising tide of appeals.

In response to Professor St. Antoine's report, therefore, the Legislature changed the composition of appeal board panels. Pursuant to the 1985 amendment, panels were reduced to two-member panels, comprised of one member each from the employee and employer representatives, the employee and general public representatives, the employer and general public representatives, or two representatives of the general public. MCL 418.261, MSA 17.237(261).

In the event, however, that the two board members are unable to reach a unanimous decision, a third member from the 15-member pool is added, by random assignment, to the panel, from a group that is not already represented on the panel, except for a panel of two general public representative members, in which case the third member shall be a general public representative. The third member's vote shall be controlling and shall be considered the final decision of the board. MCL 418.261, MSA 17.237(261).

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[5] Royal, *supra* note 3, at 983.

Since under the pre-1985 scheme a majority of two votes was all that was necessary to reach a decision in favor of a litigant, the revised statutory scheme reflected the reality of the decisionmaking process. The revised scheme also continued to reflect the fact that members do not always reach unanimous decisions, in which case a third member's vote is controlling and outcome determinative. In the final analysis, a litigant under the 1985 system receives the same process as received under the previous system, with the added benefit of greater efficiency given that more appeal board panels are available to hear and decide appeal.

In the instant case, a hearing referee (whose impartiality is unchallenged) awarded Appellee compensation benefits. Pursuant to the statutory scheme in question, Appellant's appeal was assigned to a panel consisting of a "public" representative and an "employee" representative. The general public representative member of the Appeal Board authored the decision upholding the award of benefits, with the employee member concurring. As a result of that decision, Appellee was awarded $171 weekly for a nine-month period. Because the decision in favor of awarding benefits was unanimous, a tiebreaker vote by the employer representative was unnecessary.

Now, however, Appellant claims that its Constitutional right to a fair and unbiased Appeal Board was somehow violated because no employer representative was a member of the panel which unanimously found in favor of Appellant. The Legislative reduction of panel members lies at the heart of this appeal.

REASONS WHY THE APPEAL SHOULD BE DISMISSED AND THE DECISION OF THE MICHIGAN SUPREME COURT AFFIRMED

I. Where the Hearing Referee's Decision That Appellee was Entitled to Worker's Compensation Benefits was Upheld by a Unanimous Two-Member Appeal Board Panel, Comprised of one "Public" Representative and one "Employee" Representative, Randomly Assigned from an Appeal Board Pool Consisting of Five "Public" Representatives, Five "Employer" Representatives, and Five "Employee" Representatives, Appellant was not Denied its Fourteenth Amendment Due Process Right to a Fair Decisionmaker by the Michigan Statutory Scheme for Assignments of Worker's Compensation Appeal Board Panels.

Appellant contends that the statutory scheme providing for two-member panels of the Worker's Compensation Appeal Board, MCL 481.261, MSA 17.237(261), is inherently violative of its Due Process Rights because of a mere appearance of partiality of the member representatives.[6] It follows from a review of the cases previously decided by this Court that Appellant's due process claims present no constitutional infirmities which need be addressed by this Court.

Due Process guarantees that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, "generating the

[6] Before the Michigan Supreme Court, Appellant's argument was three-pronged. It contended that the statutory procedure contained constitutionally impermissable levels of bias resulting from three interests: 1) pecuniary interest resulting from the limited, four-year terms of appeal board members, 2) a statutorily designated interest, and 3) a perceived interest. Before this Court, however, Appellant appears to have abandoned its "pecuniary interest" argument and presents a hybrid "statutorily-designated/perceived interest" argument. In any event, the argument at this point appears based only on an alleged appearance of impartiality.

feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Comm v McGrath*, 341 US 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests absent a proceeding in which he is provided an opportunity to present his case with assurance that the decisionmaker is not predisposed to find against him. See generally *Marshall v Jerrico, Inc*, 446 US 238, 242 (1980).

Because the right to a fair and unbiased decisionmaker is so fundamental, it has been jealously guarded by this Court. However, the boundaries of due process are not limitless. As this Court explained in *Tumey v Ohio*, 273 US 510, 523 (1927):

> "All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion."

Interests which are found to be too remote and insubstantial to violate the constitutional constraints are routinely upheld by this Court.

Illustrative of this principle is *Schweiker v McClure*, 456 US 188 (1982), upholding from constitutional attack 42 USC 1395u. Rejecting the notion of derivative bias merely because of the decisionmaker's affiliation with the insurance carrier which contracted with the federal government to administer a portion of the Medicare program, this Court refused to adopt either the District Court's reliance on generalized assumptions of possible interest or its placement of special weight on the various connections of the hearing officers with the private insurance carriers.

Likewise in this case, Appellant presents nothing more than generalized assumptions of partiality based on a panel member's designation as "employer" or "employee" representative. This claims flies in the face of the often enunciated presumption that hearing officers are unbiased and that

the statutory enactment is constitutional. See *Withrow v Larkin*, 421 US 35, 47 (1975).

Appellant's presumptive argument also ignores the legislative purpose to create a board of independent stature, whose members would exercise independent, professional judgment in hearing appeals. MCL 481.251, MSA 17.237(251).

Prior decisions of this Court illustrate the scope of constitutionally impermissible interests which disqualify a decisionmaker. For example, constitutional deprivations arise from a decisionmaker's direct and financial stake in the outcome of the matter [*Tumey v Ohio, supra*]; from financial benefit which may accrue to the agency or unit of government making the decision and the person making the decision is closely identified with the operation of that agency [*Ward v Village of Monroeville*, 409 US 57 (1972)]; from indirect but substantial pecuniary interest in the outcome of or possibility of personal success from the decision [*Gibson v Berryhill*, 411 US 564 (1973)]; or from direct, personal, substantial, and pecuniary interest in the outcome of the decision because of pending litigation filed by the decisionmaker which contains the same dispositive issues; in that case the decisionmaker's opinion would have the clear and immediate effect of enhancing both the legal status and the settlement value of the decisionmaker's own case [*Aetna Life Ins Co v Lavoie*, 475 US 813 (1986)].

As these cases illustrate, more than a mere possibility of bias or predisposition is necessary to rise to the level of a constitutional infirmity. At some point, the alleged biasing influence is too remote and insubstantial to violate the constitutional restraints. The claimed "bias" in this case does not even approximate the predisposition claimed in *Withrow v Larkin*, 421 US 35 (1975) or *Hortonville Dist v Hortonville Ed Assoc*, 426 US 482 (1976); yet both of those cases resulted in a rejection of claimed due process violations.

Appellee submits that Appellant's claims presented here fall considerably short of the line between permissible influ-

ences and constitutional deprivations. "Under a realistic appraisal of psychological tendencies and human weaknesses," *Withrow v Larkin*, 421 US at 47, it is exceedingly improbable that the Appeal Board panel members' decisions would be distorted merely because of his or her designation as employer or employee representative.

Although decided on statutory rather than a constitutional basis, Justice (now Chief Justice) Rehnquist's discussion in *Laird v Tatum*, 409 US 824, 833–35 (1972) is particularly helpful. In discussing the circumstances under which a judge must recuse him or herself, Justice Rehnquist stated:

> "I do not doubt that a litigant in the position of respondents would much prefer to argue his case before a Court none of whose members had expressed the views that I expressed. . . .
>
> • • •
>
> The Term of this Court just past bears eloquent witness to the fact that the Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities.
>
> • • •
>
> Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another."

Without any evidence of actual or highly probable bias or substantial probability or possibility of profit or personal interest, this Court cannot accept Appellant's bare contentions that the panel member's designation violates standards of procedural fairness embodied in the due process clause merely because they came to the Worker's Compensation

Appeal Board imbued with certain philosophies which guide their judgment in the cases before them. As the cases of this Court instruct, Appellant's contentions present a situation too remote and insignificant to upset the legislature's procedural scheme.

Appellant finds major fault with Justice Brickley's concurring opinion (which was also signed by Justice Levin, a member of the majority). Properly reduced to its essence, Justice Brickley's opinion appears to raise two points: 1) he agrees with the majority that no due process violation is presented by Appellant, and 2) he disagrees both with the majority's characterization of "representative" and with its conclusion that the general public representative member's vote cures any biases of the employee or employer members.

Despite Justice Brickley's disagreement with the majority opinion, however, he expressly agreed that a due process claim is absent in this case (See Appellant's Appendix to Jurisdictional Statement, pp A32–33). Consequently, the Michigan Supreme Court's opinion in *Williams v Hofley Manufacturing Co* must be viewed for what it is and for what it clearly stands: It is a decision signed by five members of the Court finding no due process violation presented in this case. It also presents two minority concurrences in favor of raising (but not deciding) an equal protection question; and two dissenting opinions finding a due process violation.

Despite Appellant's claims to the contrary, it is irrelevant for purposes of this appeal that some members of the Michigan Supreme Court disagreed with the prevailing members' characterization of "representative."[7] The final outcome of the case was to reject Appellant's claims of pecuniary, statutory, and perceptive bias. *Williams* stands for the proposition that more than mere assumptions of bias based on

[7] It is also unclear whether Justice Levin did in fact disagree with his own characterization of "representative." It is entirely possible that he agreed only that an equal protection, rather than a due process, question was presented by Appellant and not that the majority's characterization of "representative" was incorrect.

identification of an Appeal Board panel member with a certain representative group must be presented for a due process violation to arise.

Appellant's attempt to invoke a *Mathews* analysis [*Mathews v Eldridge*, 424 US 319 (1976)] is misplaced. Because the Michigan Supreme Court found that the Appeal Board panel which decided this case was not infected with impermissible bias, it had no reason to reach the question of what process was due to alleviate the constitutional deprivation. Even if the question were reached, however, Appellant would garner no greater success.

Conceding that Appellant has a substantial private interest at stake vis-a-vis worker's compensation decisions, the question then becomes one of an assessment of the utility of the procedural rights that are being requested. In other words, the reviewing court must perform a procedural cost-benefit analysis. Viewed properly, the question becomes: whether Appellant would have acquired a different decision had an employer representative been on the Appeal Board panel.

The member of the panel which decided in favor of Appellee was the general public representative. The second panel member, an employee representative, concurred. Therefore, even assuming an employer representative were added to decide Appellee's application and assuming further that that member would vote against awarding compensation, that dissenting vote would have no affect on the outcome of this case. It would be merely superfluous.

Looking at the same question from the broad perspective of all worker's compensation litigants, the same conclusion results. Given the intolerable state of affairs existing at the time the 1985 amendments were enacted, the state's paramount interest in amending MCL 418.261, MSA 17.237(261) was to eliminate the five-year backlog at the appellate stage so as to achieve substantial justice for both employees and employers. Reducing the panels to two-member groupings was viewed as one way to achieve more efficient panels

because in reality only two members' votes were necessary to decide an appeal. So as to achieve constitutional balance, however, the Legislature further provided that no panel could be biased in favor of either the employer or employee by having either two employer representatives or two employee representatives as the sole decisionmakers. The Legislature further provided that in the case of a split decision, a third panel member would be added (who was not already represented on the panel) to control the outcome of the appeal.

Under the above set of facts, the Legislature was achieving its goal of increasing the number of panels available to hear and decide appeals, thus reducing the outrageous backlog, without any comparable reduction in the objective nature of that decisionmaking. Therefore, even assuming (as Appellant does) that the general public representative always sides with either the employer representative or the employee representative,[8] then adding a third member (in this case an employer representative) to the panel would be superfluous inasmuch as the final outcome would be two votes in favor of the employee to one in favor of the employer. In fact, that was exactly the outcome which occurred in this case.

Appellant adds that it would cost no more for the State to return to three-member panels. Quite to the contrary, however, three-member panels were the norm for many years; yet the backlog of appeals continued to multiply almost geometrically before Professor St. Antoine's helpful and articulate report sparked legislative overhaul in 1985. Appellee submits that the cost of instituting the procedure suggested by Appellant would indeed be costly, both to employees who must endure a seemingly endless number of years wait-

[8] Appellant apparently enjoys a love-hate relationship with the general public representative. On the one hand, Appellant assumes that the general public representative member can never be trusted to make a fair and impartial decision inasmuch as he or she will always side with one of the two other members. On the other hand, Appellant later argues that the general public member can be trusted enough when added as a third member of the panel because then his or her vote will not be swayed by either member. Only the latter argument is consistent with the presumption in favor of independence and impartiality.

ing for compensation and to employers who will continue to be subject to the 70 percent rule, MCL 418.862, MSA 17.237(862) [(requiring employer to pay 70 percent of current weekly benefits during appeal if the administrative law judge finds in favor of the employee) (upheld against constitutional attack in *McAvoy v H B Sherman Co*, 401 Mich 419 (1977)]. In addition, the somewhat abstract cost of reducing public confidence in the system, thus contributing to further erosion of Michigan's industrial climate, could be substantial.

Therefore, from a procedural cost-benefit analysis, Appellant's additional procedures will add little in the way of procedural protection while resurrecting the procedural quagmire which resulted in the multi-year backlog of appeals.

For the many reasons set forth above, this Court must conclude that Appellant raises no due process questions which have not been previously addressed and answered by this Court. Consequently, Appellee requests that this Court dismiss this appeal and affirm the decision of the Michigan Supreme Court.

II. This Court has no Jurisdiction to Hear or Decide Appellant's Equal Protection Argument Where it was Not Raised Before, Considered By, Dispositive of, or Even Necessary to the Final Decision of the Michigan Supreme Court.

Appellant candidly admits that the equal protection question was not properly raised before the Michigan Supreme Court. This Court's jurisdiction to review cases calling into validity state statutes is provided by 28 USC 1257. This Court's interpretation of that statute has given rise to four requirements which must be satisfied before this Court will assume jurisdiction: the question must have been 1) raised, 2) considered, 3) disposed of, and 4) necessary to the outcome of the Michigan Supreme Court. *Crowell v Randell*, 35

US 368 (10 Pet) (1836); *Illinois Central R Co v Kentucky*, 218 US 551 (1910); *Godchaux Co v Estopinal*, 251 US 179 (1919); *Radio Station WOW v Johnson*, 326 US 120 (1945); *Beck v Washington*, 369 US 541 (1962); *United Air Lines v Mahin*, 410 US 623 (1973). Examining each of those requirements, it becomes evident that Appellant has not satisfied these jurisdictional requirements.

Even Appellant concedes that the equal protection question was not raised in any court below until after the two concurring Supreme Court Justices *sua sponte* voiced their equal protection concerns. Although Appellant claims that this concurring opinion sparked its Motion for Rehearing before the Michigan Supreme Court, it has not offered the Motion to this Court for its review. Rather, Appellant summarizes its Motion for Rehearing in its Statement of the Case. (See Appellant's Jurisdictional Statement at 7: Appellant disagreed with majority's interpretation of "representative" and claimed manifest injustice since there was no clear majority as to the due process question.) This explanation does not expressly state that the equal protection question was expressly raised in Appellant's Motion for Rehearing. Therefore, Appellant cannot satisfy even the first jurisdictional requirement that the issue be raised in the state court.

Although the equal protection question was considered by the two concurring Justices, it is not enough to explain that a question was considered and decided below by citing to the discussion in the concurring opinion. Closely related to the final jurisdictional requirement that the question be necessary to the outcome of the decision below, Appellee has already discussed that the opinion by the two concurring jurists is superfluous to the outcome of the state court decision inasmuch as a majority of five Justices found no due process problem here. Even assuming two Justices would conclude that an equal protection violation exists here, their opinion would not control or even have any effect on the final disposition in favor of Appellee. Consequently, Appel-

lant cannot satisfy either the second or fourth jurisdictional requirements.

In any event, the Motion for Rehearing was summarily denied by the Michigan Supreme Court. Therefore, there is no showing that the full court considered the equal protection question on its merits. This is an additional reason why this Court has no jurisdiction here.

Finally, even assuming *arguendo* that Appellants can reach the third jurisdictional requirement, close scrutiny of the concurring opinion shows that the question, although raised, was not decided by the concurrence: "It is not in my view the weighing of this panel itself, but the irrational manner in which this litigant has been singled out for a less favorable and receptive panel than others similarly situated that raised a constitutional question." (See Appellant's Jurisdictional Statement at A33.) Justice Brickley never discussed the merits of that question. Thus, even assuming that Appellant properly raised the question at the appropriate point in the proceedings (which it did not), and assuming that the entire state court considered the merits of the equal protection (which it did not), the court never disposed of the question inasmuch as the concurrence merely raised the question without reaching a final disposition.

This Court has, on rare occasions, addressed a question not raised below where the federal question arose from an unanticipated ruling of the state court, the petition for rehearing presented the first opportunity to raise it, and that opportunity was seized. Accordingly, in *Brinkerhoff-Faris Trust Co v Hill*, 281 US 673 (1930), where the state supreme court overruled long-standing precedent in reaching its decision, the federal question was addressed by this Court inasmuch as Appellant had no reason to doubt the authority of the overruled case when it presented its appeal to the state court. See also *Missouri ex rel Missouri Ins Co v Gehner*, 281 US 313 (1930); *Saunders v Shaw*, 244 US 317 (1917).

Upon close review, this case is not within that narrow exception, as there was no unexpected reconstruction of a

statute which resulted in the loss of a remedy or an unanticipated reconstruction of a statute threatening a litigant's constitutional rights. In addition, even assuming this case does present one of those two narrow circumstances, it is not clear on this record that Appellant seized the opportunity to fully address the merits in its Motion for Rehearing.

Rather, it appears that the two concurring Justices, as a matter of strategy, would have challenged the statute on an equal protection, rather than a due process, basis. However, Appellant waived its opportunity to raise an equal protection question by not raising it fully at any point in the proceedings below. Further, the two concurring Justices' opinion was neither dispositive of the equal protection question nor necessary to disposition of this case.

Under these set of facts, this Court is without jurisdiction to hear Appellant's equal protection claims. This Court must therefore dismiss the appeal as to the second question presented for want of a properly preserved federal question under 28 USC 1257.

III. Assuming *Arguendo* that this Court has Jurisdiction to Hear or Decide the Equal Protection Argument Presented by Appellant, Michigan's use of Two-Member Panels (With a Third Member Assigned in Case of a Split Decision), a Process Intended to Relieve Documented Docket Congestion in the Worker's Compensation Appeal Board, Does Not Deny Appellant Equal Protection as Guaranteed by the Fourteenth Amendemnt.

Resting on the presumption that this Court will exercise its prerogative power to assume certiorari jurisdiction and address the equal protection question presented, Appellant's argument then follows along the lines of the concurring Jus-

tices' opinion.[9] The argument, simply put by Appellant, is that litigants are forced to assume an unequal and disadvantaged footing before the Appeal Board for no reason which is rationally related to the State's purpose.

The fatal flaw in Appellant's argument is that it focuses on a portion of the system rather than on the system in its entirety. Appellant never attacks the Appeal Board composition established in MCL 418.251, MSA 17.237(251): a Board of 15 members made up of equal numbers of employer representatives, employee representatives, and general public representatives. Rather, Appellant contests the way the panel members are combined.

Since this claim is couched in terms of reasonableness and relation to a proper purpose rather than a claimed deprivation of a fundamental right or discrimination against a suspect class, the proper standard is the one enunciated by this Court in *McGowan v Maryland*, 366 US 420, 425–26 (1961):

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their

[9] Appellant's argument is somewhat confusing at this point. It appears to be saying that the equal protection analysis may be performed within the confines of the due process challenge (in an apparent attempt to bypass the fundamental jurisdictional problem discussed *supra*), thereby implying that the two questions are merely two sides of the same coin. Relying on the concurring Justices' equal protection concerns, Appellant somewhat inconsistently concludes that it was not afforded its due process rights because it was not on an equal footing with other litigants before the Appeal Board.

Having so concluded, Appellant proceeds to candidly admit lack of presentation to the Michigan Supreme Court, requesting this Court's exercise of its prerogative power to grant certiorari in this case. Following this request, however, Appellant fails to argue the merits of its equal protection question. Therefore, it appears that once again Appellant has not addressed the question at the proper point in this litigation.

> constitutional power despite the fact that, in practice their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it (citations omitted)."

Consequently, the equal protection question entails inquiry into the reasons behind the Legislature's creation of two-member panels and the level of inequity, if any, which resulted.

As Appellee has already detailed, the backlog facing the Appeal Board was intolerable in the mid-1980s. Consequently, the Michigan Legislature took a look at the composition of the Appeal Board to determine a way to increase the efficiency of the members without destroying the overall balance of the Board. Logically, in any case where two members of the Board agree on an outcome, the third member's vote is superfluous.

Consequently, a logical and reasonable approach to the problem was to create a balanced two-member panel, to which a third member would be added in the event the third member's vote would affect the result. In this way, more panels would be available to decide appeals, without upsetting the overall balance.

With this background in mind, the next consideration is to focus on the effect to individual litigants of the Legislature's re-composition of the Appeal Board. By reducing Appeal Board panels to two members, litigants were not losing the opportunity to have their appeals heard. Similarly, the decision by the panel continued to be balanced and avoided the danger of a decision permeated with bias in favor of either the employer or the employee. Appellant here does not contest either of these conclusions. Rather, Appellant claims that the mere fact that it lost an opportunity to "ha[ve] the public representative's ear", Appellant's Jurisdictional Statement at 10, reeks of equal protection deprivations.

The problem with this argument, however, is that it does not reach the level of a constitutional infirmity. Loss of a mere opportunity to convince the public representative's

vote implies that the general public representative cannot reach a decision without influence from either the employer or the employee representative. In fact, Appellant presumes throughout its argument that no Appeal Board member is ever impartial and that the member will always vote in favor of his or her designation. In fact, that is not at all the case; and members frequently depart from their designated representation when the facts or underlying law of any given case so requires.[10]

Appellant's argument further ignores the fact that employee litigants are similarly subject to the same constitutional "deprivation" alleged by Appellant. Just as employer litigants will have their appeals decided by employee/general public representative Boards, so may employee litigants have their appeals decided by employer/general public representative Boards. Thus, the concurring Justices' concerns that employer litigants are "singled out for a less favorable and receptive panel than others similarly situated" (See Appendix to Appellant's Jurisdictional Statement at A33) is difficult to understand given that employee litigants are similarly subject to the randomness of the panel-assignment process.

The Legislature is not duty bound to reach the perfect solution to every problem. It follows, therefore, that merely because worker's compensation litigants are subject to Boards composed of differing representatives does not mandate a finding against its constitutionality. Rather, it is only where the Legislature acted without any apparent reasonable motivation that the classification will fall. As Appellee has discussed, the Legislature was faced with an emergency situation and responded by adopting a methodology of reducing the crisis with no significant harm to litigants. Under this set of circumstances, it cannot be said that the Legislature's system is endemically unfair.

That conclusion is particularly true here, where the general public member of the Appeal Board affirmed the hear-

[10] Royal, *supra* note 3, at 985.

ing referee's decision in favor of Appellant, with the employee member concurring with the general public member. Assuming that this Court affords Appellant the process which it now claims it constitutionally deserves, the appeal board outcome will not change. Appellee will still be granted his compensation, with the employer member dissenting.

In the final analysis, the facts presented in this case are really no different from many other situations where panels, or groups, of individuals assemble to decide a certain matter.

This Court has long held that a criminal defendant has no constitutional right to be indicted or tried by any particular jury or by a jury composed in part of members of the defendant's race or class. See, e.g., *Viriginia v Rives*, 100 US 313 (1880); *Martin v Texas*, 200 US 316 (1906); *Thiel v Southern Pacific Co*, 328 US 217 (1946); *Swain v Alabama*, 380 US 202, reh den 381 US 921 (1965); *Apodaca v Oregon*, 406 US 404 (1972).

In short, employer-worker's compensation litigants may be entitled to avoid *systematic* exclusion of employer representatives from the Appeal Board. However, employer litigants have no Fourteenth Amendment right to precisely proportional representation on every individual panel.

Reference is also made to the appellate system in Michigan, which closely resembles the Appeal Board system in that the legislature has created a pool of judges from which three-member panels are drawn to decide an appeal. Admittedly, those judges came to the court imbued with certain philosophies and biases. Yet, no one would argue that judges who enjoyed a career as a county prosecutor prior to appointment or election to the Court of Appeals must necessarily be disqualified from hearing all criminal appeals merely because of that background.

The same argument applies where a jurist dies during the pendency of an appeal. The practical reality of that situation is that it would be a waste of judicial time and resources to

start over again merely because a litigant had lost the opportunity for the deceased jurist's input into the decision.

In fact, even trial judges come to the court endowed with certain inbred biases and philosophies; yet a litigant would be hard pressed to successfully obtain a judge's disqualification without a greater showing of bias.

In the end, Appellant's equal protection argument must fail because it focuses not on any systematic and invasive prejudice resulting from widescale and intentional exclusion of any group from the Appeal Board but rather on the lone fact that, through the luck of the draw, employer representatives may not be part of the panel that decides an employer litigant's appeal. As the long line of jury selection cases cited above reflect, Appellant's claims do not rise to the level of a constitutional infirmity.

Consequently, Appellant's equal protection question must be summarily dismissed without oral argument for the reason that it is unsubstantial under the prior decisions of this Court. Appellee therefore requests that this Court dismiss this appeal and affirm the decision of the Michigan Supreme Court.

CONCLUSION

For all of the above reasons, Appellee respectfully requests that this Court dismiss the appeal filed by Hofley Manufacturing Company or affirm the decision of the Michigan Supreme Court in *Williams v Hofley Manufacturing Co*, 430 Mich 603; 424 NW2d 278 (1988), upholding MCL 418.261, MSA 17.237(261), against constitutional attack

Respectfully submitted,

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